

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ABDUL-AZIZ RASHID MUHAMMAD, :
a/k/a William Anthony Brown, : CIVIL ACTION NO. 3:13-CV-2127
:
Plaintiff, : (JUDGE CONABOY)
:(Magistrate Judge Schwab)
v. :
:
UNITED STATES OF AMERICA, :
:
Defendant. :
:

FILED
SCRANTON

SEP 30 2015

PER CR
DEPUTY CLERK

ORDER

AND NOW, THIS 30th DAY OF SEPTEMBER 2015, IT

APPEARING TO THE COURT THAT:

1. Plaintiff, a federal inmate at FCI Petersburg Low filed a complaint pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2675, et seq., stemming from his imprisonment in USP Lewisburg during the period from 1990 to 1994 (Doc. 1);
2. The matter was assigned to Magistrate Judge Susan E. Schwab who issued a Report and Recommendation (Doc. 39) on August 24, 2015, concerning the United States' motion to dismiss or, in the alternative, for summary judgment, and recommending that the motion be granted, that Plaintiff be given twenty days to substantially comply with the requirements of Pennsylvania Rule of Civil Procedure 1042.3 or demonstrate a legitimate excuse for failure to comply, and that the matter be remanded to her;
3. Plaintiff's filing titled "Objection to Magistrate Report and Recommendation" (Doc. 40) is an explanation of his attempt to

comply with the Magistrate Judge's allowance regarding Rule 1042.3 rather than an objection to the Report and Recommendation and, therefore, for review purposes no objections have been filed to the Report and Recommendation and the time for such filing has passed.

IT FURTHER APPEARING TO THE COURT THAT:

1. When a magistrate judge makes a finding or ruling on a motion or issue, his determination should become that of the court unless objections are filed. See *Thomas v. Arn*, 474 U.S. 150-53 (1985). Moreover, when no objections are filed, the district court is required only to review the record for "clear error" prior to accepting a magistrate judge's recommendation. See *Cruz v. Chater*, 990 F. Supp. 375-78 (M.D. Pa. 1998); *Oldrati v. Apfel*, 33 F. Supp. 2d 397, 399 (E.D. Pa. 1998).

2. The United States' Notice of Supplemental Authority (Doc. 43) filed on September 29, 2015, informs the Court that the Third Circuit issued an opinion bearing on this case on September 2, 2015. *Schmiguel v. Uchal*, ---F.3d---, 2015 WL 5131465 (3d Cir. Sept. 2, 2015), concluded that the thirty-day notice requirement prior to dismissal of an action for failure to comply with Pennsylvania Rule of Civil Procedure 1042.6 is substantive and applies in federal court. (Doc. 43 at 1-2.) The United States also informs the Court that appropriate notice (dated September 29, 2015 (Doc. 43-1 at 1) has been sent to Plaintiff, notifying him that he has thirty days to file the requisite certificate. (Doc. 43 at 3.) As recognized by Defendant, the Third Circuit's decision

and relevant rules bear on this Court's ability to adopt the Report and Recommendation and grant Defendant's pending motion. (Doc. 43 at 3.) In this procedural posture, the best course of action is to remand this matter to the Magistrate Judge for further consideration either upon the filing of Plaintiff's certificate or the expiration of his time within which to do so.

ACCORDINGLY, IT IS HEREBY ORDERED THAT:

1. The Magistrate Judge's Report and Recommendation (Doc. 39) is ADOPTED in part;
2. Ruling on United States' Motion to Dismiss Or, in the Alternative, for Summary Judgment (Doc. 16) is stayed pending the expiration of the thirty-day notice period pursuant to Pennsylvania Rule of Civil Procedure 1042.6;
3. This Matter is remanded to Magistrate Judge Schwab.



RICHARD P. CONABOY
United States District Judge